Rules 1980 and not Order 55 Rule 13 of the High Court Rules 1980.

Miss Ambiavagar for the appellant stated that she had made a verbal application to the learned Judge for extension of time if the Judge held that she was out of time but the Judge refused to entertain her application. This fact was however not recorded anywhere in the judgment. Mr. Lobo on the other hand drew our attention to a copy of a letter from the respondent's solicitors to the appellant's solicitors dated May 20, 1983 (Enclosure (89) in Bundle of Appeal) giving notice of the preliminary objection and that this notice was in fact given one year before the application was heard by Harun J. and yet Miss Ambiavagar had not at any time made any formal application for leave to extend time.

We are of the view that this is not a case where the appellant should now be heard on an application for extension of time.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Ambiavagar & Co.; Lobo & Associates.*

TAN KUAN YAU v. SUHINDRIMANI

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Abdoolcader S.C. JJ.) January 22 & February 11, 1985]
[Ipoh – Federal Court Civil Appeal No. 20 of 1984]

Tort – Damages arising from road accident – Special Damages – Appeal on quantum of damages – Principles applicable – Misdirection by trial judge.

Practice and Procedure – Appeal on quantum of damages – Principles applicable – Misdirection by trial judge.

This was an appeal against the decision of the High Court in respect of an award for special damages arising from a road accident in which the respondent sustained injuries. The respondent was a goldsmith and the learned trial judge assessed his loss of income at $1000/– per month. On that basis he awarded $30,000.00 for 30 months during which the respondent was incapable of doing any work; $4900.00 for 7 months during which time the respondent had resumed work but only earned a reduced income of $300.00 per month and $42,270.00 for loss in earning capacity for a period of 25 years at $250.00 per month. The appellant appealed.

Held: (1) the principle which should guide the court in determining whether it should interfere with the quantum of damages is crystal clear. Much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of the case there is an erroneous estimate of the amount of damages in that either there was an omission on the part of the Judge to consider some relevant materials or he had admitted for purposes of assessment some irrelevant consideration. If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge;

(2) in this case the clear evidence was that the profit of the business was $600/– per month and there was therefore a serious misdirection in law by the learned trial judge in assessing the loss of income at $1000.00 per month and this justified interference by the appeal court;

(3) proceeding upon the basis that there was a profit of $600.00 per month and allowing a deduction of $100.00 per month for the share of the father, for the 30 months for which the respondent was not able to work he ought only to have been awarded a total sum of $15,000.00 ($500 x 30), for the next 7 months when the respondent was getting a reduced income of $300.00 per month he should be awarded only a sum of $1400.00 ($200 x 7); for loss of earning capacity, a loss of income of $100.00 per month would be a fair assessment and he should be awarded $16,900.00.

Cases referred to:

(1) *Topaiwah* v. *Salleh* [1968] 1 M.L.J. 284, 285.
(2) *Flint* v. *Lovell* [1935] 1 K.B. 354.
(3) *Greenfield* v. *London and North Eastern Railway Company* [1945] K.B. 89.
(4) *Wilson* v. *Pilley* [1957] 3 All E.R. 525, 526.
(5) *Elliot* v. *Preston* [1971] 2 L1.L.R. 328, 330.
(6) *Ilkiw* v. *Samuels* [1963] 2 All E.R. 879, 890.

SUPREME COURT.

Gurdip Singh for the appellant.
J.S. Sandu for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): This was an appeal against the decision of Anuar J. in the High Court at Ipoh on November 22, 1983 in respect of the award for special damages arising from a road accident on October 24, 1979 in which the respondent sustained injuries.

The respondent aged 23 years at the time of the accident, 27 years at the date of the trial, was a goldsmith. He gave evidence that he started to work at the age of 14 with his goldsmith father who, at all material times, was the registered proprietor of the business at a shop along Main Road, Tapah. As his father was old he did most of the work and the income went to him. His father continued to assist him. His monthly income prior to

the accident was $1,500.00 per month and out of this he paid the family expenses. He estimated that the value of his services to the business was about $1,200.00 per month.

At this stage of the proceedings, counsel for the respondent applied to amend the prayer in the Statement of Claim in respect of special damages for loss of income to read at $1,200.00 instead of $600.00. The learned Judge allowed the application for the amendment although counsel for the appellant objected to it.

The appellant was dissatisfied with the award on the grounds that the learned Judge had erred in law and in fact in assessing the loss of income at $1,000.00 per month and on that basis awarded $30,000.00 for 30 months during which period the respondent was incapable of doing any work; $4,900.00 for 7 months during which time the respondent had resumed work but only earned a reduced income of $300.00 per month and $42,270.00 for loss in earning capacity for a period of 25 years at $250.00 per month.

Now, in an appeal on quantum of damages it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, disinclined to interfere with the Judge's finding merely because the appeal court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi, C.J. (Malaya) (as he then was) giving the Judgment of the Federal Court in *Topaiwah* v. *Salleh* [1] said that:

"... So far as this court is concerned we should, to paraphrase Greer L.J. in *Flint* v. *Lovell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case."

(See *Flint* v. *Lovell*).[2]

In *Greenfield* v. *London and North Eastern Railway Company*,[3] MacKinnon, L.J. had this to say:

"The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the Judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable."

Lord Evershed, M.R. in *Wilson* v. *Pilley*[4] emphasized that:

"..... interference by this court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages, small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one."

We would also refer to *Elliott* v. *Preston*[5] where Salmon, L.J. had this to say:

"Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree..... that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award."

The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

Turning now to the present case we are firmly of the view that the learned Judge acted erroneously when he misdirected himself in law and in fact in his assessment of the damages.

It is to be observed that the law in regard to a claim for special damages is clear law in that it must not only be pleaded but proved. Diplock, L.J.

(as he then was) in *Ilkiw* v. *Samuels* [6] clearly expressed the view that:

"..... it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law over the last hundred years – that one can recover in an action only special damage which has been pleaded, and, of course, proved."

The question therefore is whether the learned Judge acted upon established principles when he fixed the loss of income at $1,000.00 per month. On the evidence before the learned Judge, it seemed clear that apart from the fact that the Statement of Claim, before the amendment, had alleged that there was a loss of income of $600.00, the respondent himself in no uncertain terms admitted under cross-examination that the profit was only $600.00 per month. The relevant part of his evidence reads:

"Before the accident, I was not paid salary. From the profit is about $600.00."

In our view this piece of evidence was highly relevant. It was a clear admission made by the respondent. Viewed in the light that the respondent was the only witness upon whose testimony the respondent sought to prove the loss, we were inclined to think that it was a clear misdirection on the part of the learned Judge when he omitted to consider it. A person judicially trained confronted with the evidence as was found in the circumstances of this case would not be unlikely to have come to a decision, on the balance of probabilities, that the loss suffered would only have been in the region of $600.00 per month. The omission to consider the relevant evidence was apparent from the grounds of judgment which clearly disclosed that the learned Judge only took into consideration the evidence given by the respondent under examination-in-chief as follows:

"The plaintiff carried out work as jeweller which is the main source of income. He also sells a few jewellery in the shop. He claims that his earning is $1,500.00 a month. After taking expenses for the family his income is $1,200.00 per month."

This was followed lower down in the Judgment in a concluding sentence which reads:

"As for loss of earnings I am of the view that the plaintiff was earning about $1,000/– per month at the time of the accident."

We reiterate that to arrive at such a finding in the light of the clear admission by the respondent constituted in our judgment a serious misdirection in law and in fact such that it justified interference by this court. It is primarily for this reason that we considered it fit to interfere.

Proceeding upon the basis that there was a profit of $600.00 per month, a deduction must be made for the share of the father who, according to the respondent, was old but still assisted him. A reduction of a sum of $100.00 should therefore be made. Thus for the 30 months during which period the respondent was not able to work he ought only to have been awarded a total sum of $15,000.00 ($5,000.00 x 3).

For the next 7 months when the respondent resumed work but was only getting a reduced income of $300.00 per month, he should have been awarded only a sum of $1,400.00 ($200.00 x 7).

And lastly, for loss of earning capacity we are of the view that a loss of income of $100.00 per month would have been a fair assessment. And granted that there was a loss in the earning capacity for a period of 25 years, the total amount, calculated on the accepted table, that should have been awarded would have come to $16,900.00.

For these reasons we allowed the appeal with costs. The order of the learned Judge was accordingly varied.

Appeal allowed.

Solicitors: *Gurdip & Co.; Sandu & Co.*

JAAFAR BIN IBRAHIM v. GAN KIM KIN

[S.C. (Seah, Mohamed Azmi & Syed Agil Barakbah S.C. JJ.) September 18, 1984 & February 23, 1985]
[Kuala Lumpur – Federal Court Civil Appeal No. 168 of 1984]

Contract – Contingent contract – Transfer of ½ share of land subject to approval of conversion and subdivision on or before specified date – Whether time essence of contract – Condition precedent – Specific performance – Contracts Act 1950, ss.36(1) & 56(1).

Practice and Procedure – Memorandum of Appeal should not contain argument or narrative – R.F.C. 1980, r. 62(1).

In this case the respondent, the registered owner of a piece of land, agreed to transfer a half-share in the land to the appellant, if he could obtain approval of the conversion